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Supreme Court of the United States

No. 574.

GENERAL MOTORS ACCEPTANCE CORPORATION, a Corporation,
Intervener and Appellant,

vs.

UNITED STATES OF AMERICA,
Libelant and Appellee,

ONE (1) CHEVROLET SEDAN AUTOMOBILE,
Engine Number 1-247-061,
Respondent.

GENERAL MOTORS ACCEPTANCE CORPORATION, a Corporation,
Intervener and Appellant,

vs.

UNITED STATES OF AMERICA,
Libelant and Appellee,

ONE (1) CHEVROLET COUPE AUTOMOBILE,
Engine Number 113-462,
Respondent.

GENERAL MOTORS ACCEPTANCE CORPORATION, a Corporation,
Intervener and Appellant,

vs.

UNITED STATES OF AMERICA,
Libelant and Appellee,

ONE (1) CHEVROLET ROADSTER AUTOMOBILE,
Engine Number 966-050,
Respondent.

HOWARD AUTOMOBILE COMPANY OF LOS ANGELES,
a Corporation,
Intervener and Appellant,

vs.

UNITED STATES OF AMERICA,
Libelant and Appellee,

ONE (1) BUICK COUPE AUTOMOBILE,
Engine Number 2-083-140,
Respondent.

BRIEF FOR AMICUS CURIAE.

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THE COURT PRESS, INC.

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Engine Number 906-050,
Respondent.

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ONE (1) BUICK COUPE AUTOMOBILE,
Engine Number 2-083-140,
Respondent.

BRIEF FOR AMICUS CURIAE.

This brief is filed by Joseph G. Myerson, New York City, as *Amicus Curiae* with the permission of the Court, granted February 23, 1932.

Opinions Below.

The cases are before the United States Supreme Court on certificate of the United States Circuit Court of Appeals from the Ninth Circuit under Section 239, amended, of the Judiciary Code. No opinion was filed by the District Court.

Questions Presented.

The questions as certified by the United States Circuit Court of Appeals are as follows:

1. Does Section 26 of Title II of the National Prohibition Act repeal by implication and render inoperative in liquor importation and transportation cases the forfeiture provisions of the Customs Laws, in so far as offending vehicles are concerned? Or, putting the question in another form:

2. Do the mandatory provisions of Section 26 of the National Prohibition Act apply when the automobile has been seized while in the act of transporting intoxicating liquor across the border and some distance into the United States?

3. May the government, in such a case, ignore such mandatory provisions, arrest the driver, and elect to forfeit the automobile under the customs laws?

4. Is the record in the criminal case wherein the driver pleaded guilty of violating the customs laws (Tariff Act of 1930) admissible in the separate forfeiture proceedings wherein the intervener is the only party appearing, for the purpose of showing unlawful importation by the automobile, or for any other purpose?

Statutes Involved.

National Prohibition Act, Title II, Sec. 26, Chap. 85, Act Oct. 28, 1931; 41 St. L. 305, 315; 27 U. S. C. A. Sec. 40.

Sec. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of the trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the same, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in any other proceeding brought

for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there be no newspaper published in such city or county, in a newspaper having circulation in the county once a week for two weeks, and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Revised Statutes, Sec. 3061-3062, 19 U. S. C. A. 482-483.

3061. Search of vehicles and persons.—Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast or otherwise, and to search any trunk or envelope, wherever

found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.

3062. Forfeitures.—Every such vehicle and beast, or either, together with teams or other motive power used in conveying, drawing, or propelling such vehicle or merchandise, and all other appurtenances, including trunks, envelopes, covers, and all means of concealment, and all the equipage, trappings, and other appurtenances of such beast, team or vehicle, shall be subject to seizure and forfeiture. If any person who may be driving or conducting, or in charge of any such carriage or vehicle or beast, or any person traveling, shall willfully refuse to stop and allow search and examination to be made as herein provided, when required so to do by any authorized person, he shall be punishable by a fine of not more than $1,000, nor less than $50.

Willis Campbell Act. Nov. 23, 1921, C. 134, Sec. 5, 42 Stat. 223, 27 U. S. C. A. 3.

3. Effect on existing legislation.—All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force on October 28, 1919, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly

in conflict with any provision of this title; but if any act is in violation of any of such laws and also of this title, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other.

Statement of Facts.

The following statement of facts is quoted from the certificate of the United States Circuit Court of Appeals for the Ninth Circuit:

> "On four different dates during July and August 1930, the four automobiles whose forfeiture is an issue were seized at ports of entry on the Mexican border, each vehicle having liquor concealed therein. Three of the cars were seized at San Ysidro, California, and the fourth at Calexico, California. Each car was observed crossing the international boundary line from Mexico and traveling some distance thereafter in the United States, and in each instance the concealed liquor was discovered at an official stopping place of the United States Customs Service. The seizures were effected by Customs officers.
>
> All four drivers of the cars were arrested. Each was charged with violations of the Tariff Act of 1930; namely, unlawfully importing liquor into the United States, and knowingly concealing and facilitating the transportation of such liquor. Each indictment alleged failure to obtain a permit, failure to pay duties, and failure to make entry at the custom house. The four defendants entered pleas of guilty to the first count, which charged importation, and were sentenced by the court. In each case, the remaining count was dismissed.
>
> A libel of information *in rem* was filed by the United States Attorney against each automobile, claiming its forfeiture under the provisions of Sections 3061 and 3062 of the Revised Statutes (19 U. S. C. A. 482 and 483). In three of the

cases the General Motors Acceptance Corporation intervened as owner of the attached automobiles, and in the other case the vehicle was claimed by the Howard Automobile Company. All the interveners set up proof of ownership, averred that they were innocent of any illegal acts in which the vehicles may have been involved, and prayed the court to dismiss the libels, contending that the government's sole remedy was under Section 26, Title II, of the National Prohibition Act (27 U. S. C. A. 40).

In each case, it was stipulated that the liquor alleged to have been found in the automobile was intoxicating in fact and fit for beverage purposes. It was further stipulated, subject to the objection by the libelant that such a purported defense was incompetent, irrelevant and immaterial, that neither the seller nor the intervener had any notice of the illegal use, or intended illegal use, of the automobile.

The government offered in evidence at the forfeiture proceedings the judgment roll, consisting of the indictment and sentence, in the criminal cases, at which, as stated above, pleas of guilty had been entered. The intervener in each case objected to the introduction of this judgment roll, on the ground that it was incompetent, irrelevant and immaterial; that no proper foundation had been laid; that the roll was not binding upon the intervener; and that it did not show that the intervener was a party to the criminal action or had notice of it. The objections were overruled and the records were admitted in evidence, to which the respective interveners duly excepted.

Testimony of customs officers showed that the four automobiles were driven across the international boundary some distance into the United States before being searched and seized.

The District Court entered decrees of forfeiture in all four cases, finding that each automobile was engaged in smuggling dutiable merchandise into the United States in violation of the customs law thereof."

Argument.

POINT I.

Proceedings in forfeiture of an automobile used for the smuggling into and transportation of intoxicating liquor within the United States must be instituted under Section 26 of the National Prohibition Act and may not be maintained under the Customs Act (R. S. 3061-3062).

For many years following the enactment of the National Prohibition Act enforcement officers, in prosecuting forfeiture of automobiles seized while transporting intoxicating liquors, variously invoked Sections 3061, 3062 of the Revised Statutes, the Customs sections, Section 3450 Revised Statutes, the Internal Revenue section, and Section 26 of the National Prohibition Act referring to transportation of intoxicating liquors.

It was urged upon the Government by representatives of the automobile industry that the use of these sections other than Section 26, was unfair and improper, and that Congress by the enactment of the National Prohibition Act intended that act to be the instrument of enforcing the prohibition of traffic in intoxicating liquors. This position was urged because the Customs and Revenue sections make no provision for safeguarding the rights of innocent lienors, whereas such rights are specifically respected under Section 26.

The Revenue Section, R. S. 3450 has been definitely adjudicated. The history of the litigation concerning this section becomes important in the present case in view of the close affinity between Sections 3450 and 3061-3062.

Both were enacted as an aid to the collection of taxes, the former, the revenue tax, the latter the customs; both statutes were part of the same tax plan enacted by Congress in July, 1866, R. S. 3450 on July 13, 1866, R. S. 3061-2 on July 18, 1866; both statutes provide for absolute forfeiture; neither statute makes recognition of the rights of innocent owners or lienors. Indeed it may be said that R. S. 3061-3062 are the "3450" of the Customs Laws.

Following the enactment of the National Prohibition Act, as already suggested, it was urged that R. S. 3450 had in effect been repealed. However, the United States Supreme Court held in 1926 (*United States* v. *One Ford Coupe Automobile,* 272 U. S. 321), that the section was still in force and effect and could in a proper case be invoked by the government. Representatives of the automobile industry thereupon urged the doctrine, accepting the soundness of the *Ford Coupé* decision, that nevertheless where transportation of intoxicating liquors was indicated, Section 26 of the Prohibition Act may and that section alone must be employed in forfeiture proceedings.

This issue was finally squarely presented to the United States Supreme Court in *Richbourg Motor Co.* v. *U. S.,* 281 U. S. 528. In that case the Court held that proceedings could not be maintained for forfeiture under R. S. 3450 of an automobile discovered and seized while being used illegally to transport intoxicating liquor.

It would seem, therefore, that the true inquiry in this case is whether the same reasons which impelled the Supreme Court so to decide in respect of the Internal Revenue section should not require a co-ordinate ruling

that the customs sections may not be employed in such a case.

That this is so becomes evident from attentive consideration of the argument and decision in the *Richbourg* case.

The fundamental basis of the argument in the *Richbourg* case, and of the decision, rested upon Section 5 of the Willis Campbell Act (27 U. S. C. A. 3) which provides that all laws in regard to manufacture and taxation of and traffic in intoxicating liquor and all penalties for violation of such laws that were in force on October 28, 1919, shall be and continue in force as to beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act. It was urged and the Supreme Court in effect found that Section 26 of the Prohibition Act is in direct conflict with, and as to a case involving violation of both, has repealed Section 3450. It is now submitted that Section 26 is in direct conflict with and as to a case involving a violation of both has vitiated the provisions of R. S. 3061-62.

Analysis of the mandatory provisions of Section 26 indicates this direct conflict. The provisions of this section require:

(a) That upon an officer discovering that intoxicating liquor is being illegally transported or illegally possessed *it shall be his duty to*

1. Take possession of the automobile.
2. Arrest the person in charge thereof.
3. Proceed against the person arrested under the provisions of the National Prohibition Act.

(b) That the Court, upon conviction of the person, *shall*

1. Order the liquor destroyed.

2. Order the public sale of the automobile, unless good cause to the contrary is shown by the owner thereof.

(c) That the officer carrying out the order of sale of the Court *shall*

1. After deducting certain expenses provided for in the statute pay all liens according to their priority, which are established by intervention or otherwise as being *bona fide* and existing in favor of one who had no notice of the proposed illegal use of the vehicle.

In short, the section is mandatory in its statement as to the duties and obligations of the arresting officer and the Court whenever there shall be discovered a violation of Section 26. The arresting officer, where violation of this section and another statute are both indicated, may not elect which remedy he shall pursue, the United States Attorney may not so elect and the Court may not. Indeed there may be no executive or judicial election, for as Mr. Justice Butler has pointed out in his dissenting opinion in the *Ford Coupe* case, the law, that is, Section 26, makes the election.

Absurd conclusions follow unless the word "shall" as used in this section is accepted and construed in the injunctive sense of "must".

If the word "shall" as used in Section 26 were given the discretionary interpretation urged by the government we would have a statute providing that "when the commissioner, his assistants, inspectors or any officer of the law shall discover any person in the act of trans-

porting in violation of the law intoxicating liquors in any wagon, automobile, water or air craft or other vehicle, it *may* be his duty to seize any and all intoxicating liquors found therein being transported contrary to law."

It is obvious that such an interpretation will not lie. Indeed if the wording were "He shall seize", instead of "it shall be his duty to seize", the word "shall" would require a mandatory interpretation. But the very use of the term "it shall be his duty to seize", eliminates any possible doubt as to whether Congress intended that the provision should be mandatory.

The next sentence of Section 26, if given a discretionary construction, would require the following reading: "Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he *may* take possession of the vehicle and team or automobile, boat, air or water craft or any other conveyance and *may* arrest any person in charge thereof."

This construction is illogical since it would permit an officer discovering a violation of the law to exercise his discretion as to whether or not to arrest the person unlawfully engaged.

Reading further in Section 26 it becomes evident that the very next sentence requires beyond all question, a mandatory and not a discretionary construction of the preceding sentence. For it *assumes that the arrest shall have been made,* to-wit, "* * * and shall arrest any person in charge thereof. Such *officer shall at once proceed* against the person arrested *under the provisions of this title* in any court having competent jurisdiction." CAN THIS POSSIBLY MEAN THAT THE OFFICER *MAY* AT ONCE PROCEED? OR THAT HE MAY PROCEED UNDER SOME OTHER STATUTE?

It is submitted that there is a direct conflict between Section 26 and Sections 3061-3062 by reason of the fact that Section 26 in mandatory language requires that proceedings must be brought under Section 26 whenever violation of that section is discovered. Being mandatory the section precludes recourse to Sections 3061-3062 or any other sections where a violation of both is discovered, thereby furnishing the direct conflict referred to in the Willis Campbell Act.

This identical argument was presented to the Supreme Court in the *Richbourg* case to sustain the proposition that Section 26 was in direct conflict with, and in a case involving a violation of both had repealed, Section 3450. How was it received by the Court? The opinion of the Court recites:

> "This language of Section 26 is in form mandatory throughout. It is made the 'duty' of the officer discovering any person in the act of transporting liquor to seize the liquor, when 'he shall take possession of the vehicle' and 'shall arrest any person in charge' of it. He 'shall at once proceed against the person arrested under the provisions of this title'. The vehicle 'shall be returned to the owner' upon his giving bond. 'The court upon conviction of the person so arrested * * * shall order a sale by public auction of the property seized' and the officer making the sale 'shall pay all liens which are established * * * as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor * * *'. It is plain that, whenever the vehicle seized by the arresting officers is discovered in use in the prohibited transportation, literal compliance with these requirements would compel the forfeiture under Section 26 with the consequent protection of the interests of innocent

lienors. To that extent, Section 26, if interpreted to exact such compliance, is in direct conflict with the forfeiture provisions of Section 3450 and supersedes them whenever any person within the provisions of Section 26 is discovered 'in the act of transporting * * * intoxicating liquors in any * * * vehicle,' which liquor is 'removed * * * deposited or concealed * * * with intent to defraud the United States' of the tax. But the government contends that Section 26 is not to be read thus literally; that it was not intended by its mandatory phrases to do more than state generally the duty resting on all law enforcement officers to enforce the law, but which leaves them free, when the same act or transaction constitutes an offense under different statutes, to proceed under either one. It is argued that Section 26 could not have been intended to preclude district attorneys from prosecuting violations of Section 3450 merely because they involve transportation, and it can no less be taken to deprive them of their election to forfeit the offending vehicle under either section.

"Undoubtedly, 'shall' is sometimes the equivalent of 'may' when used in a statute prospectively affecting government action. See *Railroad* v. *Hect*, 95 U. S. 168; *West Wisconsin Ry. Co.* v. *Foley*, 94 U. S. 100, 103. The usual provisions of criminal statutes prescribed is not necessarily to be taken, as against the government, to direct prosecution under that rather than some other applicable statute.

"But the prescription in detail, by Section 26, whenever transportation is involved, of successive steps to be taken which, if followed, lead unavoidably to forfeiture under that section and no other, with the important consequence of protecting the interests of innocent third persons, suggests a definite purpose to make the protection effective by bringing all forfeitures in such cases under its controlling provisions. If the purpose were the more general one of imposing on government officers the general duty to procure the forfeiture at their election, either under Section 26 or any

other applicable statute, most of the requirements of Section 26 might have been omitted. The end sought could have been attained more easily by the simple enactment, in the language of Section 3450, that the offending vehicle 'shall be forfeited', saving the rights of innocent lienors if the proceeding were had under Section 26.

And again *'We think that Congress did not take the precaution to enact the carefully chosen language of Section 26 merely to impose general duties on prosecuting officers, already placed on them by other sections of the Act, but that its purpose was to preclude the nullification of the protection which Section 26 has extended to innocent third persons'."* (Italics ours.)

What the Supreme Court pronounced in the *Richbourg* case concerning the effect of the enactment of the National Prohibition Act upon the Revenue Laws (R. S. 3450) applies with equal force to its effect upon R. S. 3061-3062. Indeed the government recognized and urged both in its brief in the *Richbourg* case and in its argument before the Court that an adverse decision would bar the use by the government of the customs sections in cases just such as are now under consideration. As a matter of fact in the *Davies Motor Company* case, argued and decided with the *Richbourg* case, the facts of record showed that the liquor was smuggled.

In its brief submitted to this Court in the case of *Richbourg Motor Co.* v. *United States,* No. 452 of the October, 1929 term, the Government took the position that if that case was decided adversely to the Government, it would follow that in a case involving transportation the customs sections could not be employed, or in other words, that the theory advanced by the petitioner in the *Richbourg* case relative to R. S. 3450 is equally applicable

to R. S. 3061-62. We quote from the Government's brief, at page 23:

> "The construction of Section 26 as compulsory and exclusive in all cases where transportation is involved will produce consequences which could hardly have been intended * * * where a vehicle is used to smuggle intoxicating liquor and is seized while transporting such liquor across an international border, it may be forfeited only under Section 26, although the offense of smuggling, entailing a complete forfeiture under Sections 3061-62 R. S. (U. S. C. Title 19, Sections 481-483), has been simultaneously committed. * * * In short, where a vehicle or vessel is used in the illegal transportation of liquor, the Government is precluded from securing a forfeiture not only under Section 3450 for tax evasion, but under any other statute imposing a forfeiture for some other simultaneous offense, such as under the Customs or Navigation Laws, where the interests of innocent owners are not saved."

POINT II.

A. The basis of the alleged conflict between the Customs sections and the National Prohibition Act is identical with the basis of the alleged conflict between the Revenue section and the National Prohibition Act.

B. No greater statutory relief is afforded an aggrieved claimant under the Customs sections than is afforded an aggrieved claimant under the Revenue sections.

We have seen that the basic conflict between the Revenue Law and the Prohibition Law rests upon the fact, first, that the Prohibition Law being mandatory

precludes recourse to any other section, and second, and more forcibly, the fact that the Revenue section does not save the rights of innocent parties whereas the National Prohibition Act does. This conflict was very clearly indicated by Mr. Justice Stone in his concurring opinion in the *Ford Coupe* case. Although what he stated referred to the Revenue section, no violence would be done to the force of his logic if his language were adapted to refer to the Customs sections. Mr. Justice Stone said:

> "I agree that the Willis Campbell Act requires Section 3450 of the Revised Statutes and Section 26 of the National Prohibition Act to be so construed as to stand together *in so far as they are not in direct conflict.*
>
> "I agree also that there conceivably may be a deposit or concealment of illicit liquor in an automobile with intent to defraud the United States of the tax upon it, which is not transportation within the meaning of Section 26, and to that extent the two sections are not in conflict. *But I cannot subscribe to those expressions in the opinion which seem to suggest that the two sections are not in direct conflict in a case where there is transportation of liquor in a vehicle in violation of the National Prohibition Law with intent to deprive the United States of the tax. In that case Section 26, it seems to me, plainly directs that the seizure shall be made and proceedings for the forfeiture of the seized vehicle had under that section.* In that event Section 26 saves the interest of the innocent owner or lienor from the forfeiture required by Section 3450. It appears to me that the conflict in such a case is direct and that Section 26 by its terms is controlling." (Italics ours.)

The Government has also taken this view of the conflict between the sections. In its brief in these cases

before the United States Circuit Court of Appeals (unfortunately the Government's brief before this Court has not been received at the present writing) it attempts to show that this conflict does not exist as between the Prohibition and the Customs Laws by endeavoring to indicate that the rights in seized property of innocent parties are preserved and guarded under the Customs Laws. We quote from page 10 of the Government's brief before the United States Circuit Court of Appeals.

> "In dealing with the Customs Laws, therefore, if it may be demonstrated that the rights in seized property of such innocent persons are preserved and guarded by the law the basis of the conflict is removed, and if there be no conflict the two sets of laws may then stand side by side available for use as desired by the prosecuting officers under the facts."

We agree with that hypothesis.

The Government's brief then goes on to point out that under Sections 613 and 618 of the Tariff Act of 1930 (19, U. S. Code 1613, 1618) an innocent owner or lienor may apply to the Secretary of the Treasury for remission or mitigation of the forfeiture and argues that this right to petition for remission or mitigation preserves the rights of the innocent owners and lienors and therefore dissipates the apparent conflict. However, that the right to petition the Secretary of the Treasury for remission or mitigation removes the conflict does not appear to be the view of this Court, for the identical sections, 613 and 618 of the *Tariff Act* are available to an innocent owner or lienor whose property has been forfeited under the *Revenue Section 3450,* involved in the *Richbourg* case, just as they are available to one affected by the Customs forfeiture sections. Section 709 of the Revenue

Act of 1928 provides "The provisions of law applicable to the remission or mitigation under the Customs Laws shall apply to forfeitures incurred or alleged to have been incurred before or after May 29, 1928; under the Internal Revenue Laws".

Surely if this Court was not of the opinion when it decided the *Richbourg* case that these remission sections preserved the rights of innocent owners and lienors no good reason appears why a different interpretation or construction should now be made.

It is not difficult to understand that the right to petition the Secretary of the Treasury or the Attorney General affords only poor and inadequate protection, if any, to the aggrieved innocent lienholder or owner. In an important contribution to the law of forfeitures, a practising attorney of long experience with forfeiture cases has observed:

> "The Tariff Act provides for the remission or mitigation of forfeitures incurred without willful negligence or intention on the part of the owner or lienholder to violate the law. Act June 17, 1930, c. 497, 46 Stat. 757, Sec. 618, 19 U. S. C. A. Sec. 1618; Prohibition Reorganization Act. May 27, 1930, c. 342, Sec. 1, 46 Stat. 427, 27 U. S. C. A. 101-108. This provision has been extended to the Internal Revenue Act. May 29, 1928, c. 852, Sec. 709, 45 Stat. 882, 26 U. S. C. A. Sec. 2709. The procedure is a petition addressed to the proper member of the Cabinet: The Secretary of the Treasury, The Secretary of Commerce, or the Attorney General as the case may be.
>
> 'The purpose * * * is, obviously, that of protecting the interests of innocent persons.' Treasury Decision 35, July 12, 1928.
>
> However beautiful may be the theory, experience demonstrates that the purported protection

is valueless. Effective operation of administrative remission under modern conditions is impossible. During four and one-half years of contact with forfeiture cases, the author has seen the claims of innocent petitioners repeatedly stricken down. It is this situation which necessitates this note.

Obviously no cabinet officer can give to each petition for remission adequate personal consideration, yet personal judgment is mandatory and the discretion is non-delegable. *United States ex rel. Heller* v. *Mellon,* 40 Fed. (2d) 808 (D. C. App. 1930). The adjudication cannot be reviewed by any court. *General Finance Co. of Louisiana* v. *United States,* 45 Fed. (2d) 380 (C. C. A. 5th, 1930).

Even if the official, neglecting national issues, personally considered each petition, he could not grant adequate relief. He is limited to the petition and affidavits filed by the claimant and the reports of his own officials, which are apparently in all cases presumed to be true. Although the remission statute grants the Administrative official the right to have testimony taken, the right is seldom if ever used. Sitting as a trial court, he has no evidence to act on and is responsible to no appellate jurisdiction!

The petitioner has no right to face those who accuse him of negligence or connivance—facts that must be found before the Cabinet member has any justification for refusing the petition. The petitioner has no right to cross examine those who accuse him. Having filed his petition, he must wait in silence for the decision from Washington. What reports are sent to the capital he never knows.

Another practical impediment to remission has received scant attention. By the Act of Mar. 3, 1925, c. 438, Sec. 2, 43 Stat. 1116, 19 U. S. C. A. 523, as amended May 27, 1930, c. 342, Sub-Sec. 9, 10; Stat. 430, 27 U. S. C. A. 42, it is provided that any vehicle forfeited through Court for violation of the Prohibition, Internal Revenue or Cus-

toms Acts may, upon application of the head of the department for which the seizure was made, be transferred by the Court to the federal officials for use in the enforcement services. By the same act it is provided that in case of summary forfeiture, such a transfer may be made by the head of the department himself.

Witness the party becoming judge in his own case—a condition contrary to the fundamentals of our jurisprudence. Faced with a petition for remission and a request from his subordinates for a transfer of the car, the Cabinet official must find himself in an embarrassing situation. In such a case it is much simpler to refuse the petition of a stranger than to refuse the application of a subordinate for an instrument that, without cost, will increase the effectiveness of enforcement.

It is provided that the court, in court forfeitures, *may* transfer the automobile, but it is interesting to note that the innocent owner or lienor has no right to oppose such an order and insist on the questionable right of salvaging some part of his loss by buying the car on auction sale. *The Alert,* 24 Fed. (2d) 239.

To all practical intents, therefore, there is no effective protection of the innocent under these acts" (McDonald, Automobile Forfeitures, Texas Law Review, February, 1932).

Section 26 of the National Prohibition Act permits the aggrieved innocent owner or lienor to present his claim before the Court. Until the Congress sees fit to amend the Tariff Act to give an innocent lienor or owner that same right it cannot be said that the dubious administrative relief of mitigation or remission "by grace" is a saving of the claimant's rights equivalent to the protection afforded him by the Prohibition Act so as to eliminate the conflict.

POINT III.

A. Section 26 Title II of the National Prohibition Act supersedes the forfeiture provisions of Sections 3061-3062 of the revised statutes in cases involving both the unlawful importation and transportation of intoxicating liquor.

B. There has been no reenactment of those provisions of Sections 3061-3062 here involved.

Section 3062 alone provides for forfeiture of the vehicle unlawfully engaged. Section 3061 somewhat modified was partially reenacted as Section 581 of the Tariff Act of 1922, as follows:

> "Officers of the customs or of the Coast Guard, and agents or other persons authorized by the Secretary of the Treasury, or appointed for that purpose in writing by a collector may at any time go on board of any vessel or vehicle at any place in the United States or within four leagues of the coast of the United States, without as well as within their respective districts, to examine the manifest and to inspect, search, and examine the vessel or vehicle, and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel or vehicle, or the merchandise, or any part thereof, on board of or imported by such vessel or vehicle is liable to forfeiture, it shall be the duty of such officer to make seizure of the same, and to arrest, or, in case of escape or attempted escape, to pursue and arrest any person engaged in such breach or violation."

Section 3061 as it still appears as Section 482 of 19 U. S. C. A. set forth at page 4 of this brief, was not reenacted, nor was any part of 3062 reenacted in either the Tariff Act of 1922 or 1930. In other words the sections under which these particular libels are brought remained in force only by virtue of their original enactment *prior to the National Prohibition Act* and are therefore statutes which were "in force" within the meaning of the Willis Campbell Act.

It is true, as the government will undoubtedly point out, that other sections may be found in the Tariff Law affecting importation, but these cases are concerned specifically with Sections 3061-3062, never reenacted.

Indeed, if there had been a reenactment of these particular sections they would not supersede the Prohibition section. Such result might have followed if instead of enacting new general Tariff laws, Congress had singled out these particular sections for amendatory legislation. It might even have followed if Congress enacting a new general Tariff Law had made substantial changes in the forfeiture sections. That is not, however, the case.

Between the time of the enactment of the Willis Campbell Act in 1921 and the Tariff Act of 1922, Revised Statutes, Sections 3061-2 were statutes "in force" within the meaning of the Willis Campbell Act. They occupied the same relative position to Section 26 of the Prohibition Act as did Section 3450, for all were sections enacted prior to 1919 and all contained provisions which were subsequently to be held in conflict with Section 26.

The mere restatement or reenactment of these provisions would not have changed the position which Sections 3061-3062 occupied relative to Section 26 of the Prohibition Act, because the identical sections "in force" before

the adoption of the 1922 act would have continued "in force" after such adoption. To assume that the mere restatement of these sections already "in force" would have changed the position which these sections occupied relative to Section 26, we must reach the conclusion that Sections 3061-2 if reenacted would be open to different construction from 3061-2 already in force. That conclusion would not lie, for it has been repeatedly held that the reenactment in the same or substantially the same terms of a statute which has received a judicial construction, amounts to a legal adoption of such a construction (*Heald* v. *District of Columbia,* 254 U. S. 20; *U. S.* v. *Feld,* 204 U. S. 142).

As far as its effect upon forfeiture procedure is concerned, the reenactment of these sections would be negative and superfluous; because even if there had been no Tariff Act of 1922 and no Tariff Act of 1930, the old provisions 3061 and 3062 would continue "in force" just as does 3450 and would be available to the government in all cases except those involving transportation of intoxicating liquor. It will be remembered that in the *Ford Coupe* case the petitioners had contended that the enactment of the Prohibition Law had in effect repealed Section 3450. If that contention had been sustained then a reenactment of Section 3450 would have been necessary before that section could have been invoked in a case *not* involving transportation. That is clear from the language of Mr. Justice Stone in the *Ford Coupe* case as well as in the *Richbourg* case where the mandatory language of Section 26 is so carefully analyzed and where such importance is given to it.

So it is with the Customs sections, no reenactment was necessary to preserve those sections to the use of the government in a case not involving transportation; the

reenactment would not make the sections available to the government in a case which does involve transportation.

It is, of course, a well established doctrine that a later statute, general in its terms and not expressly repealing a prior statute, will not ordinarily affect the special provisions of such earlier statute (*In re Crow Dog,* 109 U. S. 536).

This doctrine was urged by the petitioner in *Callahan* v. *United States,* 576, decided April 11, 1932 (United States Daily, April 12, 1932) by this Court. The following is quoted from the opinion of the Court:

> "We are asked to hold that one who violates the Prohibition Act by importing liquor may not be indicted, tried and sentenced under the Tariff Act which makes the importation of 'any merchandise contrary to law' a criminal offense. The phrase 'contrary to law' as used in a later act is unqualified, and taken in its natural meaning signifies 'contrary to any law', and hence contrary to the earlier Prohibition Act, so that a violation of that Act would be an offense within the other. * * *
>
> The petitioner urges that the National Prohibition Act deals specifically with intoxicating liquor, prohibits its importation and provides a penalty therefor; whereas the Tariff Act is concerned with a wholly separate subject, and the penal section 593-b aimed at unlawful importation should not be construed as repealing the earlier special statute.
>
> This argument overlooks the fact the National Prohibition Act prescribed no special penalty for importation and violation of its provisions. Section 26, of Title II, an omnibus section fixing penalties for violations for which no special penalty is prescribed, is the only one under which punishment could be imposed for illegal transportation. The language used is sufficiently broad

to include specific penalties fixed in other sections of the statute and also such as might be imposed by separate legislation. The Tariff Act, a later statute, fixes a definite penalty for one of the violations grouped in the penal section of the earlier act. In this respect it superseded the general provisions of the prior statute embracing the same statute."

If any analogy is to be drawn between the *Callahan* case and the instant case, is it not that inasmuch as Section 26 of the National Prohibition Act is concerned with a specific unlawful act, that is, transportation, and fully prescribes the procedure for forfeiture in a case involving transportation, the reenactment of the Customs sections, which do not specifically concern themselves with transportation offenses, unassociated with unlawful importation, would be subject to the rule above referred to—that the later general statute should not be construed as repealing the earlier special statute.

However, speculation on the possible effect of the reenactment of the section under which these libels are brought is perhaps unprofitable since there was no such reenactment.

Conclusion.

The position set forth in this brief is supported not alone by precedent and statute but by logic and by the dictates of fairness and justice. It is supported by statute in that the forfeiture provisions of the Customs Law being inconsistent with the provisions of the National Prohibition Act are declared by the Willis Campbell Act to have been superseded by the latter. It is supported by logic in that it is unreasonable to assume that the Congress enacting a Prohibition Act in 1919 should have intended that a provision deliberately included in that Act

be discarded for enforcement purposes in favor of a provision of an Act of 1866, the current use of which is so obviously designed to accomplish the general intent of the discarded section, while at the same time making nugatory and unavailable those provisions of that section which protect innocent lien holders. The Prohibition Act was designed to correct an evil and was never intended to be the instrument with which to visit forfeitures and penalties upon innocent persons. It is supported by fairness and justice since the drastic remedy of the Customs Law is directed not alone against the transgressor, but against the innocent lienor, whose rights are so clearly intended to be guarded by the National Prohibition Act.

Justice, for example, can hardly countenance the confiscation of an automobile and the forfeiture of the property of an innocent lienor and the abandonment of any criminal prosecution of the actual offender. Yet such cases are frequent.

"The frequent practice of prosecutors is to secure forfeiture under the tax law in advance of bringing a criminal prosecution, if any." Howard Lee McBain, Ruggles Professor of Constitutional Law in Columbia University. "Prohibition Legal and Illegal," Macmillan 1928.

It is, we believe, a fair assumption that the conditions surrounding the initial enactment of the forfeiture provisions of the Customs Law were so different from those surrounding the passage of the Prohibition Act that this Court is justified in taking judicial notice of the differing conditions. The commercial and banking contacts in the period of 1866 were direct and simple and it is fairly inferable that vendors, vendees and mortgagees had opportunity to have reasonable notice of their respective

purposes and intentions. We are now in a totally different age, in which such parties know nothing of each other and in most transactions do not even meet. Commercial and banking transactions are impersonally conducted, in fact cannot be conducted in any other manner. Trade, commerce and banking must be facilitated with rapid and intelligent service. This is fundamentally the age of transportation—the motor age. The mass production of motors and its complement, mass consumption, required the creation of coordinated banking facilities for consumers, as the majority of motors are sold on credit with supporting liens on the motors so sold (see Prof. Edwin R. A. Seligman, MacVickar Professor of Political Economy, Columbia University, on "The Economics of Installment Selling"—Harper & Bro. 1927), Great banking institutions have arisen specializing in this type of credit. Subtract the credit sales of motors and this great industry would shrink in volume to its great damage and that of related and supporting industries. The framers of the Prohibition Act in drafting Section 26 must have had in mind the equitable protection of the banking institutions which in good faith, lawful purpose and innocence of conniving at infractions of law, finance motor lien paper to the extent of billions of dollars per annum. What good purpose can be subserved by visiting losses upon them by invoking the operation of a statute whose harshness was so obviously intended to be negatived by the terms of Section 26?

It may be pertinent to indicate to this Court that those who have suffered from the promiscuous use of the Customs Sections, bankers and automobile merchants, have no quarrel with the National Prohibition Act nor with its strict enforcement. They neither condone the offenses against it nor approve or support the offender.

Great care is employed to finance only sound risks and to prevent automobiles from coming into possession of bootleggers, rum runners and other improper persons.

These forfeiture proceedings have resulted from those instances where, notwithstanding the care exercised to prevent it, cars have been purchased, generally through subterfuge, by those unlawfully engaged or those who purchase with intent of lawful use and later determine to engage in illegal acts.

Your *Amicus*, speaking for the automobile merchants and the special banking corporations which are interested, respectfully submits that justice cannot give countenance to permitting the resurrection of an ancient statutory provision for the harsh enforcement of a modern statute to the injury of innocent persons whose rights that modern statute itself jealously preserves.

> "The damnable character of the 'bootlegger's' business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. 'To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; * * * in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice'" (Mr. Justice McReynolds, dissenting in *Carroll* v. *United States*, 267 U. S. 132, at 163).

It is respectfully submitted that questions 1 and 2 should be answered "Yes" and that question 3 should be answered "No".

Respectfully submitted,

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Amicus curiae.